

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 197

July 13, 1998, 5:50 p.m.
Page S-8049 Temp. Record

PROTECTION OF PROPERTY RIGHTS/Cloture, motion to proceed

SUBJECT: The Property Rights Implementation Act of 1998 . . . S. 2271. Lott motion to close debate on the motion to proceed.

ACTION: CLOTURE MOTION REJECTED, 52-42

SYNOPSIS: As introduced, S. 2271, the Property Rights Implementation Act of 1998, will remove extensive procedural barriers that prevent Americans from gaining access to Federal courts to assert their Fifth Amendment constitutional right to receive just compensation for real property that is taken by the Federal Government or a State or local government. Details are provided below.

- Taking. A “taking,” for purposes of this Act, will be defined as any action whereby the ownership, alienability, possession, or use of private property is an object of that action and is taken (including by physical invasion, regulation, exaction, or condition) so as to require compensation under the Fifth Amendment to the United States Constitution.

- Abstention. A Federal District Court will not be permitted to abstain from exercising jurisdiction over a claim concerning the use of real property (real estate) if such action does not include a claimed violation of a State law, right, or privilege, and a parallel proceeding in State court is not pending. In other words, if only Federal claims are alleged, State adjudication will not be demanded before Federal courts will consider those claims. If an unsettled question of State law is raised during the consideration of a Federal case, that question will be answered in State, not Federal, court. States that have certification procedures for answering such questions will use those procedures.

- Ripeness and State and local law. Under current case law, a takings claim must be “ripe” in order to be heard in Federal Court. In *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, the Supreme Court stated that a takings claimant must show that a “final decision regarding the application of the regulations to the property at issue” has been reached by “the government entity charged with implementing the regulations” and that the claimant has requested “compensation through the procedures the State has provided for doing so” (the second requirement was added in dicta). Lower court decisions have issued

(See other side)

YEAS (52)			NAYS (42)			NOT VOTING (6)	
Republicans (47 or 89%)		Democrats (5 or 12%)	Republicans (6 or 11%)	Democrats (36 or 88%)		Republicans (2)	Democrats (4)
Abraham	Hutchison	Conrad	Chafee	Akaka	Kennedy	D’Amato- ²	Biden- ²
Allard	Inhofe	Dorgan	Collins	Baucus	Kerrey	Frist- ²	Breaux- ²
Ashcroft	Kempthorne	Ford	Gregg	Bingaman	Kerry		Glenn- ²
Bennett	Kyl	Landrieu	Jeffords	Boxer	Kohl		Torricelli- ²
Bond	Lott	Reid	Roth	Bryan	Lautenberg		
Brownback	Lugar		Snowe	Bumpers	Leahy		
Burns	Mack			Byrd	Levin		
Campbell	McCain			Cleland	Lieberman		
Coats	McConnell			Daschle	Mikulski		
Cochran	Murkowski			Dodd	Moseley-Braun		
Coverdell	Nickles			Durbin	Moynihan		
Craig	Roberts			Feingold	Murray		
DeWine	Santorum			Feinstein	Reed		
Domenici	Sessions			Graham	Robb		
Enzi	Shelby			Harkin	Rockefeller		
Faircloth	Smith, Bob			Hollings	Sarbanes		
Gorton	Smith, Gordon			Inouye	Wellstone		
Gramm	Specter			Johnson	Wyden		
Grams	Stevens						
Grassley	Thomas						
Hagel	Thompson						
Hatch	Thurmond						
Helms	Warner						
Hutchinson							

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

conflicting decisions on how this standard must be met. Recently, in *Suitum v. Tahoe Regional Planning Agency*, the Supreme Court clarified that the *Williamson* standard is a prudential standard. Such standards can be altered by law. This bill will set a clear standard for ripeness for Federal jurisdiction. A property owner must first make a meaningful application for a land use to the governing land agency. If the agency denies the application and gives a written explanation, a new application must be submitted taking into account the reasons for rejection given in the explanation. If rejected a second time, or if no written explanation was given for the first rejection, the property owner must then file an appeal or seek a waiver. If the property owner is again denied, the decision will be considered final and ripe for a Federal claim, unless an elected local body has authority to review land use appeals. In that case, the elected local body will have to reject the application before a decision is considered final. Thus, between three and five decisions by the governing authority in question will be required before the Federal Government will consider whether that governing authority has violated the constitutional rights of a private citizen. In all instances, private property owners will be exempted from making appeals or seeking waivers if such actions would be futile, as futility is defined in case law. A final decision will not require the exhaustion of all State remedies before a Federal claim may be filed.

- Takings suits against the Federal Government. A decision will be considered final: if the United States has made a definitive decision regarding the permissible uses for the real property in question; and one meaningful application to use the property has been submitted but has not been approved within a reasonable time, and the party seeking redress has applied for one appeal or waiver which has not been approved within a reasonable time. The last condition only applies if the applicable law has an appeal or waiver mechanism. A decision will also be considered final without the filing of any application, reapplication, appeal, or waiver if the District Court determines any of those actions are unnecessary because they would be futile. The statute of limitations for such actions will be 6 years from the date of the taking. Attorney's fees and costs may be awarded to a prevailing plaintiff. The Court of Appeals for the Federal Circuit will have exclusive appellate jurisdiction over such civil actions.

- Jurisdiction. A property owner may file a civil action challenging the validity of any final Federal agency action as a violation of the Fifth Amendment in a Federal District Court or in the Court of Federal Claims. Those courts will exercise concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation.

- Notice. Any Federal agency that takes an action to limit the use of private property will notify the affected property owners.

On July 9, 1998, Senator Lott sent to the desk, for himself and others, a motion to close debate on the motion to proceed.

NOTE: A three-fifths majority (60) vote is required to invoke cloture.

Those favoring the motion to invoke cloture contended:

James Madison, in his celebrated Essay on Property, wrote the following: "Government is instituted to protect property of every sort . . . this being the end of government. That alone is a just government, which impartially secures to every man whatever is his own." John Adams, in his Defense of the Constitutions of Government, cautioned that "The moment the idea is admitted into a society that property is not as sacred as the laws of God, and there is not force of law and public justice to protect it, anarchy and tyranny commence." The Fifth Amendment to the Constitution, in conformance with the strong views of the Founding Fathers, bars the taking of private property for public use without just compensation. The right to be compensated for private property that is taken by the government is one of the most fundamental rights in our country. That right is being effectively denied through the use of procedural delays that deny people access to the Federal courts. If people could get into Federal court to state their claims, they could win when their rights have been violated, but the courthouse door is locked. This bill will unlock that door.

Two main problems will be fixed. The first problem is that there is great legal uncertainty over when a case can go to a Federal court. Generally, plaintiffs are required to exhaust every possible State and local legal avenue before pursuing a Federal claim in Federal court. Only after exhausting those avenues is a case considered "ripe" for Federal consideration. For instance, if someone purchases a tract of land that is zoned for commercial development, and the local government decides to instead change the zoning to block any development, that person will have to pursue every possible State and local remedy to try to get the decision changed or to get compensated. Many State and local authorities have become very adept at imposing complicated, repetitive requirements, and at delaying making decisions. Many people who get caught in the frustrating maze of trying to fight city hall try to get Federal relief, but most Federal filings are dismissed before the merits are even reached. Between 1990 and 1997, 80 percent of the cases were dismissed. For those few landowners who fought matters through until they were finally able to get a Federal decision on the merits, it took an average of 9.5 years. As a practical matter, only very rich interests can afford to pursue such litigation for that long. As a practical matter, the right to be compensated for property that is seized by a government, which was considered to be a fundamental, indispensable constitutional right by our Founding Fathers, is routinely and deliberately trammelled by governments, and only the rich have the ability to fight back. State and local governments are not the only bad actors. Federal agencies are every bit as guilty, if not more so. They have become very adept at frustrating citizens' rights to get into Federal court to challenge agency actions that have destroyed the value of their land without giving them compensation. They impose onerous and lengthy regulatory processes for challenges to their decisions, and they deliberately avoid making decisions in order to keep them from being challenged. People effectively lose the right to use their property. Of course, they still retain the right to pay taxes on it.

This bill will take care of the problem of access by defining very clearly when a property rights constitutional case may be taken

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to Federal court. It will stop endless delays by Federal agencies that are deliberate attempts to deny people their constitutional rights, and it will put simple, definite limits on the number of State and local procedures that must be followed before going to Federal court. Those limits on State and local procedures to defend Fifth Amendment rights will still be more onerous than any restrictions put on any other constitutional rights. For instance, in the case of *Collins v. Smith*, a Federal Court was not worried about ripeness when it decided to hear a Nazi Party challenge of a town in Illinois' decision to deny it a parade permit to march through a Jewish neighborhood. The town had denied the permit because the Nazis said they could not afford to pay the permit fee; the Nazis were pursuing a waiver of the fee, and then decided they did not want to wait for a decision before going to Federal court. Similarly, in *Sutherland v. DeWulf*, the town of Rock Island, Illinois tried to prosecute someone who had burned the American flag. The flag burner went straight into Federal court to sue the city government, even though State proceedings had just begun. The Federal Government, without the slightest whiff of concern over ripeness, took up the case. The right to peaceably assemble, the right to free speech (which supposedly includes the right to burn the American flag), and the right to be compensated for property that is seized by a government are all enshrined in the Bill of Rights of the Constitution--why then are property rights alone given such weak protection? There quite honestly is no legitimate reason for the disparity. This bill will still not put property owners on an equal footing with Nazis and flag-burners, who do not have to seek any local remedies before alleging that their constitutional rights have been violated, but it will bring them closer--they will only have to go through three to five local procedures before the Federal courts will hear their cases.

The other major change that will be made by this bill will be to correct a problem that occurs once property owners finally manage to get their cases heard on the merits. That problem is that their cases are split between two Federal courts. If they elect to challenge the validity of a law or regulation that has violated their constitutional property rights, they go to a district court. If they wish to seek compensation for a violation of their constitutional property rights, they go to the Federal Court of Claims. This bill will solve the problem of split jurisdiction very simply--it will give concurrent jurisdiction.

Several spurious charges have been raised against this bill. For instance, some Senators have said that it will result in a lot of extra work for the Federal courts. If that claim were true, the proper solution would be to make sure that the courts could handle the work, not to say that to avoid giving the courts more work we should continue to infringe on constitutional rights. However, that claim is not true. Most experts expect only a small increase in work. Federal, State, and local land use agencies will just quit engaging in unconstitutional behavior. In most cases, disputes will be settled quickly and fairly. Another charge that has been raised is that property owners who want to open adult bookstores near schools, or houses of ill repute next to churches, or similarly offensive establishments, will be able to gain Federal court orders allowing them to proceed. This charge is utter nonsense. A well-established body of Federal case law clearly establishes the right of State and local governments to block public nuisances. Similarly, they are clearly allowed to establish zoning regulations.

Interestingly, the very Senators who are always willing to impose mandates on State and local governments have also said that they oppose this bill because it will violate State rights. They say that it will involve the Federal Government in the minutiae of local land-use decisions. In response, it will not involve the Federal Government by having it make decisions on zoning or any other matters, or by creating new bureaucracies, or by imposing new taxes, or by imposing new regulations, or by taking any of the other intrusive actions our colleagues like to champion--instead, it will only involve itself to the extent necessary to stop local governments from taking away rights from individuals. It will not create government--it will limit it. It will only involve itself in State and local decisions to the extent that those decisions are taking away individuals' constitutional rights.

Ironically, the motion to proceed to this bill is being filibustered. Our colleagues do not want to even give us a chance to state our case. We are willing to debate this bill on its merits, to consider amendments, and to vote on its passage, up or down. They are not. Just as property owners are being denied their chance to defend their constitutional rights in court, we are being barred by this filibuster from bringing up legislation to open the court house door for them. Though a majority of Senators favor passage of this bill, we do not have enough votes to invoke cloture today. We will be back. Eventually, we are confident that we will succeed.

Those opposing the motion to invoke cloture contended:

This bill will help big, rich developers override local governments. For example, if a small town now wants to preserve a tract of land as a park because of its scenic beauty, it can pretty much do so. A big developer may want to come in and put up hundreds of townhouses, doubling the town's size, or may want to build a large, polluting factory, but that town has the final say. If it wants the land to remain undeveloped, it will remain undeveloped. That decision, made at the local level, is not an assault on property rights--it is a defense of property rights. If some rich, out-of-State developer could buy a chunk of land in the middle of town and do with it whatever he pleased, he could easily ruin the value of the property of everybody in town. For instance, he could put in bars, adult bookstores, a trash dump, a hulking office building, a factory, or a house of prostitution, and the value of all the adjacent properties would plummet. Our point is that all property owners have property rights, and that when one owner makes any use of his or her property, that use affects surrounding property owners. Decisions about any use of a particular tract of land, therefore, cannot be made in isolation. The closest representation of the views of a town's property owners is from its local government. A local government knows and understands the views and wishes of its citizenry and is best able to balance their interests. We are by

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no means arguing that a local government should be allowed to violate constitutional property rights--we are only saying that it is better able to decide if they have been violated because it understands intimately all of the local land-use laws, the backgrounds of any disputes, and the effects that different decisions may have. When someone believes that their property rights have been violated, they should pursue all possible State and local remedies first, because State and local governments have the best understanding of the issues involved and can thus make the most informed decisions. Ultimately, the Federal courts should not be (and are not) foreclosed, but their involvement, if necessary, should be at the end of the process.

This bill will make it very easy for any property owner to have a case heard in Federal court. After a few, minimal attempts to get approval for a particular land use at the local level, an owner will be able to haul a local government into Federal court. The cost of defending against such suits, especially for very small towns, will be prohibitive. Effectively, rich landowners will be able to blackmail little towns into letting them do whatever they want with their property. Federal judges, sometimes thousands of miles away from the towns, will make local zoning decisions based on their theories and without any understanding of the wishes of the people of those towns. In effect, this bill will end 200 years of local control of land use decisions, and will give it not to State officials, and not even to Federal officials who are controlled by Federal legislatures, but to Federal judges who have to answer to no one. This bill is strongly opposed by numerous State and local legislative groups. It is also strongly opposed by environmental groups, because thousands of property owners claim that environmental laws have taken away the value of their land, and they have been blocked from seeking compensation in Federal court for those takings. We urge our colleagues to stand with State and local governments, and with environmentalists, by voting against the motion to invoke cloture.